



STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE APPEAL OF
A VARIANCE GRANTED TO CASA DEL
CANON CONDOMINIUMS, BAEHR/ROEHL
TAOS, NEW MEXICO

LW 02-03 (A)

HEARING OFFICER'S REPORT AND RECOMMENDED FINDINGS

DISCUSSION

Third parties appealed the granting by the District II Taos Field Office of three liquid waste permits for exceeding the maximum allowable discharge for lot size under 20 NMAC 7.3, Liquid Waste Disposal Regulations (LWDR).

The hearing was held in this matter on June 27 and July 22, 2002, in Taos, New Mexico, with a provision to leave the record open until August 2, 2002 for the purpose of accepting additional information about the number of bedrooms existing in the current units. The Department was represented by Chris Cudia and Brian Schall. Appellants appeared with a number of interested parties and neighbors; Applicant was represented by James Thompson, engineer. The hearing clerk was present to tape record the proceeding. No party was represented by counsel at the hearing.

Ultimately, the recommendation to reverse the Field Office is based in part on the testimony at the hearing relating to the number of bedrooms in the existing units, and in larger part on the three liquid waste permit applications themselves and a reading of the applicable regulations.

SUMMARY OF TESTIMONY

The testimony at the hearing offered by neighbors and existing condominium unit owners and residents touched on several issues; with the primary ones as follows:

- (1) The question of just how many acres supported the permit application (the range testified to was between 9 and 13 acres), with the Appellants alleging that the actual acreage was smaller than represented on the tax rolls and the liquid waste permit applications.
- (2) The question of how many bedrooms exist in the current units already served by two existing liquid waste systems; this is relevant to the permit applications at hand insofar as the new systems might have to be adjusted to account for greater wastewater flow, with the Appellants stating that although the original permits were for twelve 2-bedroom units, at least six of the units were built as 3-bedroom units. Field Office staff confirmed that several of the existing units were 3-bedroom units.
- (3) The accuracy of the maps submitted to support the applications, with the Appellants challenging that accuracy as flawed in reflecting wells and lines at the site.
- (4) The diligence of the Applicants in maintaining the existing systems, with the Appellants stating that existing maintenance was lacking, and that they had had to pay to have the system pumped out themselves after the Applicants neglected to do so over a period of years.
- (5) The existence of a homeowners association, with the Appellants insisting that such an association did not legally exist for the purpose of assuming responsibility for the maintenance of the new wastewater treatment systems.

The Field Office staff described the applications and the permitting process, and answered a number of questions about the application and the supporting maps. They also performed a confirmatory bedroom survey of the existing units to verify that in fact there were additional bedrooms beyond those permitted for liquid waste purposes.

Applicant's engineer, Mr. Thompson, spoke about the permit application and the property and answered a number of questions as well about the proposed systems.

Exhibits submitted and made part of the record include maps and the site plan showing the location of the proposed units, wells and lines; correspondence; evidence of revocation by the Corporation Commission of Vista del Canon, Inc.; a capital declaration under the Apartment Ownership Act; and other documents in which neighbors and existing unit owners express their concerns about the project.

More specifically, the following testimony was given at the hearing held June 27, 2002:

Mr. Cudia testified that there were 3 variances in question at this hearing. Staff had reviewed the applications for variance and had determined that they were consistent with the regulations and made the determination to grant them on February 28 2002. They had reviewed the variance applications with liquid waste experts, and had decided that the ground water protection offered was equal to or greater than that provided by the minimum lot size requirements.

Mr. Schall testified concerning the history of the variance applications. He stated that the variances had been denied three years prior, but that the Nayadic treatment system had been re-designed, re-tested and re-submitted for consideration. In particular there has been third party testing on the systems, which found that they met state engineering design criteria. Mr. Schall

stated that the Nayadic system had been installed nationwide and in other places of New Mexico. The systems were usually installed for single family dwellings. Although he did not know whether there were other large commercial denitrification systems made by Nayadic, the systems were designed for the flow anticipated on this property. Nayadic is an aerobic treatment unit which recirculates flow partly to a drain field, and partly to a septic tank or anoxic zone.

On cross-examination, Field Office staff were questioned about the accuracy of the plans submitted by Applicants showing setbacks, whether the number of bedrooms in the existing units have been undercounted, and whether the ground water level estimated at 5 feet in depth was accurate. Mr. Cudia stated that he had visited the site in the last month, had personally measured for all minimum setbacks and found that they were met. As to the number of bedrooms in the existing units, he stated that if more bedrooms were built than were permitted, the permit could be revoked. As to the water level he believes that the estimate of 5 feet in depth is an extremely liberal one. Ground water is highly influenced by the adjacent stream known as the Rio Fernando. He believes the water table is actually deeper than seven feet, based on a test pit dug there and a good data set from a surrogate stream, the Rio Pueblo de Taos.

On further cross-examination, Field Office staff were questioned about how the Applicants could impose the costs of maintenance on a condominium association. Mr. Cudia stated that Applicants would be required to submit an executed maintenance contract for the new systems. They were also asked whether the Ground Water Bureau had reviewed the applications for variance. Mr. Schall stated that the Ground Water Bureau had not reviewed the applications, that if there were a discharge of 2000 gallons per day or more, the Applicants would need a discharge plan under the Ground Water Regulations, but that each system in question is handling

a discharge of 1800 gallons per day.

On further cross-examination, the Field Office staff were questioned about what was different from three years ago when the variance applications were denied. Mr. Schall stated that three years ago the systems had not been designed specifically to reduce nitrogen. The company re-designed the system based on sound engineering principles. Staff was also asked about noise. Mr. Schall stated that the pumps are fairly low volume pumps, not high noise compressors, and that they would be inside housing. Staff was also asked about whether the system constituted a community water system. Mr. Cudia stated that it may or may not, that the consequence of whether it is relates to setbacks, and that the system met the setbacks regardless.

Mr. Ross Ulibarri testified that he believes the Nayadic is an experimental system and would not be a benefit to the community. The Applicants cannot point to another such system that can be examined. Things have been corrected in the university setting. He has a big question on the maintenance contract. The condominium association has no desire to be responsible for the maintenance of the system.

Ms. Elmira Martinez testified that the condominiums would be built in a rural area which is desperately in need of water.

Ms. Ellen Brodsky testified that she is the president of the homeowners association. She stated that the developers are not conscientious, the site plans are inaccurate, and the setbacks could not be verified. She also testified that the number of bedrooms in the existing units exceeded the number of bedrooms originally permitted. She further stated that notice of this hearing had not been sent to all homeowners. No legally valid condominium association was established, and the question of responsibility for maintaining the new system is important. The

existing homeowners are not a rich association of retirees, and most of them do not live there full-time. The association pays for garbage pickup and electricity for the wells and for insurance, but they cannot even afford to pay for insurance in a lump sum; they make installment payments. The homeowners have grave concerns about what will happen if the system breaks down, particularly if there is no money for repairs.

Thomas Johnston testified that he is the vice president of the homeowners association, that currently the association is not legally in effect, and it has no bylaws. The association was originally created in 1970, but its legal status was revoked for failure to file reports since 1981. Mr. Johnston further stated that the history of wastewater systems on the site has been poor. Tanks installed in 1984 were lost to history, and cannot be found to be serviced.

Mr. Adrian Trujillo testified that the community needs viable drinking water.

Mr. Maestas testified that he is concerned about wells being dug and how much water is on the site.

Ms. Pat Hoffman of San Geronimo Lodge testified that her main concern was maintenance. There is no responsible party here.

Ms. Kristen Ulibarri testified that the Nayadic system is experimental, and she is concerned that if maintenance is not kept up the sewage will be running into their drinking water.

Mr. James Thompson, the Applicants' engineer, testified that the well shown on the wrong place on the map was his error; he had measured in the wrong place. He does not know where the septic tanks were. The lines on the map are schematic, and the developers are still trying to find all existing lines and tanks. The required setbacks are only 10 feet so he did not look for them. A very similar system treatment system is operating in New Mexico and properly

permitted. The Nayadic is not an experimental system. All pumps and treatment works have alarms, both visual and audible, in the event of failure.

Mr. Patrick Drumm stated that he was concerned that someone could turn off the alarms in the event the pumps were malfunctioning and that the alarm system could be defeated. He wondered about proper notification procedures.

The hearing was reconvened on July 22, 2002, for the purpose of taking testimony from those who had not been notified of the June 27, 2002 meeting, for the purpose of accepting testimony on the number of bedrooms in the existing units, and for the purpose of accepting testimony on the legal status of the homeowners association.

The following testimony was given when the hearing was reconvened on July 22nd, 2002: Ms. Francis Chandler testified that in obtaining a permit in 1984, the Applicants had represented that they had 16 acres. They did not have this amount of acreage to begin with. They now have 9.26 acres, and are saying they have 12.9 acres. They should not count acreage that has been deeded out. According to the county tax rolls, the applicants have 11.388 acres. The existing units, several of them, have three bedrooms, not two. She was on the septic committee of the homeowners association, which wanted to clean out the existing tanks. No one could find them. They are retirees with limited funds, it is a loose association, and it is difficult to find \$3000 to clean out tanks. When they finally cleaned out the tank, the sludge had almost turned to concrete. They have voted not to accept responsibility for a high-tech high maintenance septic tank system.

Ms. Ellen Brodsky testified that she become aware of a gentleman with property near the river who had not been notified of the hearing. She further stated that the homeowners

association had never been properly formed to begin with. The developers corporation, Vista Canon, Inc., had lapsed. The developers have never cleaned the existing tanks, and there's a lack of concern for existing structures. In a recent homeowners meeting they voted not to pay for the new tanks or the maintenance of them. The whole septic system would lie on land not belonging to them, and they're not responsible for it. Using the usual definition of bedrooms, and looking to the Uniform Building Code in deciding whether or room constituted a bedroom, half of the existing units have three bedrooms rather than two. Accounting for the additional bedrooms in the total design flow for wastewater brings the design flow well over that originally permitted, and over 2,000 gallons per day. The permit should not be issued if the developers cannot identify someone other than the existing homeowners association to execute a proper maintenance agreement for the new systems.

Ms. Cynthia Anderson testified concerning the plots shown on the map, and explained the dotted lines designating the plots.

Margaret Vigil on behalf of Sen. Cisneros urged the department to consider existing compliance in the permitting decision.

Mr. Schall stated that he was asked to testify about whether the additional flow, accounting for the additional bedrooms, affected the nitrogen loading for the new system. The systems are efficient, and could be tweaked or adjusted to hit a target of 75 percent treatment, for example, instead of 71 percent. He has not yet done the math, but the additional flow could be addressed. If the existing number of bedrooms brings the total design flow over 2000 gallons per day, they should not have a liquid waste permit, but the matter should be referred to the Ground Water Bureau.

At the end of the hearing on July 22nd, 2002, I left the record open a second time, until August 2, 2002, because I wanted the Field Office staff to confirm the results of the bedroom survey that had been performed by Ms. Brodsky. The Field Office staff reported their findings to me verbally on July 24th and July 30th. They confirmed that several of the existing units had three bedrooms rather than two: the rooms are of sufficient size to be bedrooms, they have their own egress, and some of them have a full bath.

ANALYSIS

The applications for the variances in question are dated January 7, 2002. One application appears to have photocopied in triplicate, with different permit numbers on the top, and the distinguishing markings "system 1," "system 2," and "system 3" under "Justification." Between that date and February 28, 2002, correspondence indicates that the Applicants and the Field Office staff worked together to make the applications complete and approvable. The application for liquid waste permit supporting each of the requests for variance is also identical among the 3 systems, again with just the distinguishing words "system 1," "system 2" and "system 3" for differentiation. The parcel or lot described in support of each system is the same parcel or lot, with the same legal property description. Staff approved the variance for each of the 3 systems on February 28, 2002.

A review of the application shows that total wastewater flow planned for the property is 9,000 gallons per day. There are 2 existing systems supporting the existing condominiums, each of which is permitted for less than 2,000 gallons per day, and 3 more are planned, with each planned system to be receiving less than 2,000 gallons per day. The effect of splitting the total wastewater flow for the property into five parts, each handling a discharge of less than 2,000

gallons per day, is that the Applicants remain within the Liquid Waste Management realm and avoid regulation under the Ground Water Regulations requiring a discharge plan.

Notwithstanding the historical practice of the Field Operations staff in permitting such "splitting," it appears that dividing the total wastewater flow on a single property among several wastewater treatment systems for the purpose of staying within the Liquid Waste Management Regulations and avoiding regulation under the Ground Water Regulations is not consistent with applicable law.

The relevant sections of the Liquid Waste Management Regulations follow:

Section 20.7.3.102: "This Part [20.7.3 NMAC, the Liquid Waste Disposal Regulations adopted by the Environmental Improvement Board] applies to on-site liquid waste systems that are designed to receive and do receive two thousand (2,000) gallons or less of liquid waste per day, and that do not generate discharges that require a Discharge Plan pursuant to 20 NMAC 6.2 or a National Pollutant Discharge Elimination System (NPDES) permit."

Section 20.7.3.107.AX.: "'On-site' means located on or within a lot."

Section 20.7.3.107.AY.: "'On-site liquid waste system' means a liquid waste system, or part thereof, serving a dwelling, establishment or group....."

Section 20.7.3.107.AR.: "'Lot' means a unified parcel where liquid waste will be generated or disposed, excluding roadways.... 'Lot' includes any contiguous parcel subject to a legally recorded perpetual easement which dedicates the servient parcel for the disposal of liquid waste generated on the dominant parcel."

Section 20.7.3.107.T.: "'Design flow' means the flow rate for which an on-site liquid waste system must be designed in order to assure acceptable system performance.... 1. For

residential sources, the design flow shall be calculated.... Multiple family dwelling unit source design flows shall be calculated as the sum of design flows for each single family unit included."

Section 20.7.3.107.BV.: "'Total design flow' means the sum of design flows for all on-site liquid waste systems and other wastewater discharges on a lot."

Section 20.7.3.401.A.: "The type of on-site liquid waste system shall be determined on the basis of location, lot size, soil, [etc.]....and shall be designed to receive all design flows from the property." (Emphasis added.)

The relevant sections of the Ground Water Regulations follow:

Section 20.6.2.3104: **"Discharge Permit Required.** ...[N]o person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge permit...."

Section 20.6.2.3105: **"Exemptions from Discharge Permit Requirement.** ...B. Effluent which is discharged from a sewerage system used only for disposal of household and other domestic waste which is designed to receive and which receives 2,000 gallons or less of liquid waste per day...."

Section 20.6.2.7.NN: "'Sewerage system' means a system for disposing of wastes, either by surface or underground methods, and includes sewer systems, treatment works, disposal wells and other systems."

The Applicants are required on two grounds to apply for a discharge permit rather than a liquid waste permit:

- (1) The existing systems are handling the wastewater flow for more than the original number of bedrooms permitted, and more than 2,000 gallons per day, as calculated under the relevant Liquid Waste Management Regulations.
- (2) The proposed systems bring the total wastewater flow for the property far above 2,000 gallons, and although splitting the flow among several systems brings the flow for each new system below 2,000 gallons, Section 401.A requires a liquid waste system to receive all flows from a property. The exemption in Section 3105 of the Ground Water Regulations is not available to them on either ground, because the sewerage system does not receive 2,000 gallons per day or less of effluent.

RECOMMENDED FINDINGS

1. Applicants own the property in question, in Taos, New Mexico, Taos County.
2. Three permit applications were submitted by Applicants; the permits were granted on February 28, 2002 by Courte Voorhees, District II Manager.
3. Third parties the Ulibarris and others timely sought an appeal of the approval of the permits, and a hearing on the appeal was held June 27, and July 22, 2000, in Taos, New Mexico, by a hearing officer properly appointed.
4. The hearing in this matter was conducted pursuant to 20 NMAC 7.3.203, such that all relevant views, arguments and testimony could be presented. Every participant was allowed full opportunity to call witnesses, present testimony and other evidence, introduce exhibits, and cross-examine witnesses called by any other participant. All testimony was taken under oath.

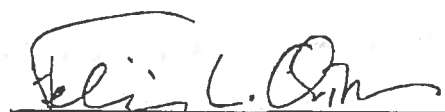
5. The hearing was recorded; several audiotapes are part of the record. Closure of the record was delayed until August 2, 2002 for the purpose of a confirmatory bedroom survey performed by Field Office staff of the existing condominium units.
6. No objections were made to any exhibits offered, and all are part of the record; the applications for liquid waste permits, the original permits for the property from 1984, and the approvals; associated correspondence; the request for hearing; the Notice of Hearing; sign-in sheets from the hearing; maps and diagrams of the site; several documents related to the legal status of the homeowners association and this Report.
7. The Liquid Waste Management Regulations do not allow the issuance of a liquid waste permit for any property on which total wastewater flow exceeds 2,000 gallons per day, either by design or actual flow; such a property is subject to the discharge plan requirements in the Ground Water Regulations. See Section 20.7.3.401.A and Section 20.6.2.3105.
8. The permit applications submitted reflect a total anticipated wastewater flow of 9,000 gallons following the installation of the three new systems.
9. The two existing systems, each of which is designed to handle less than 2,000 gallons per day, are actually receiving more than 2,000 gallons per day as a result of the construction of the existing units with 30 bedrooms instead of the 24 that were permitted under the Liquid Waste Regulations.
10. At the hearing, pursuant to 20 NMAC 7.3.202 and 203, Appellants bore the burden of proof to establish by clear and convincing evidence that the liquid waste permits should be denied.

11. Appellants established that the Field Office staff's approvals should be reversed, based upon the permit applications submitted for review; and the evidence that the existing units were built with several more bedrooms than had been permitted, resulting in the application of the Ground Water Regulations rather than the Liquid Waste Management Regulations to the site and its current and planned discharges.
12. The final decision in this matter has been properly delegated to the Director of the Field Operations Division by the Secretary of the Environment Department.

RECOMMENDED FINAL ORDER

A draft Final Order consistent with the recommendations above is attached and incorporated by reference. A decision should be made by August 23, 2002, fifteen working days following the closing of the record, in accordance with 20 NMAC 7.3.203.G. The decision shall be sent by certified mail to the Appellants, Applicant, and ED staff; it can be sent by regular mail first-class to the others who requested a copy, as noted on the sign-in sheet.

Respectfully submitted,



FELICIA L. ORTH, Hearing Officer

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT



IN THE MATTER OF THE APPEAL OF
A VARIANCE GRANTED TO CASA DEL
CANON CONDOMINIUMS, BAEHR/ROEHL
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LW 02-03 (A)

FINAL ORDER

This matter comes before the Director of the Field Operations Division (Director) as the designee of the Secretary of Environment following a hearing before a hearing officer on June 27 and July 22, 2002 in Taos, New Mexico. Third parties appealed the granting by the District II Taos Field Office of three liquid waste permits for exceeding the maximum allowable discharge for lot size under 20 NMAC 7.3, Liquid Waste Disposal Regulations (LWDR).

The Director having considered the hearing record, including all exhibits and the Hearing Officer's Report and being otherwise fully advised regarding this matter hereby adopts the Hearing Officer's Recommended Findings.

IT IS THEREFORE ORDERED that District II's action is reversed for the reasons set out in the Hearing Officer's Report and Recommended Findings. The permits cannot be issued under the Liquid Waste Disposal Regulations, and the matter will be referred to the Ground Water Bureau for action under the Water Quality Control Commission Regulations.

MICHAEL R. KORANDA
Director, Field Operations Division

NOTICE OF PROCEDURE FOR APPELLATE REVIEW

There is no statutory right of appeal from this Final Order. Any aggrieved party may seek review in the District Court, by writ of certiorari, pursuant to Rule 1-075, NMRA 1998.

CETIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Final Order was mailed on August 26, 2002 via certified mail to the Applicants and the District II Manager, and to the Ulibarris, Ms. Brodsky, Ms. Chandler, Ms. Hoffman, Mr. Johnston, and Ms. Vigil at the addresses shown on the sign-in sheets.

Carolyn Vigil

CAROLYN VIGIL, Hearing Clerk